BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

KATHY L. MURPHY	)	
Claimant	)	
	)	
VS.	)	
	)	
STATE OF KANSAS	)	
Respondent	)	Docket No. 1,054,829
	)	
AND	)	
	)	
STATE SELF INSURANCE FUND	)	

ORDER

STATEMENT OF THE CASE

Respondent and the State Self Insurance Fund requested review of the July 14, 2011, preliminary hearing Order entered by Administrative Law Judge Steven J. Howard. James E. Martin, of Overland Park, Kansas, appeared for claimant. Karl L. Wenger, of Kansas City, Kansas, appeared for respondent the State Self Insurance Fund.

The Administrative Law Judge (ALJ) appointed Dr. Lowry Jones to be claimant's authorized medical physician, ordered respondent to pay all expenses set forth in Exhibit 2 as authorized and necessary to cure and relieve claimant from the injury effects and ordered respondent to pay the court reporter costs of the hearing.[1]

The record on appeal is the same as that considered by the ALJ and consists of the transcript of the July 12, 2011, Preliminary Hearing and the exhibits, together with the pleadings contained in the administrative file.

ISSUES

Respondent requests review of whether the injury alleged by claimant arose out of and in the course of her employment and whether at the time of her accident, claimant was

[1] Although respondent mentions a July 6, 2011, deposition of claimant in its brief to the Board, that deposition transcript is not contained in the Division's file and is not a part of the record.

on the premises of her employer or on the only available route to or from her work which was a route involving a special risk or hazard and which was a route not used by the public except in dealings with the employer. Respondent asserts the ALJ exceeded his jurisdiction and contends that claimant's alleged accidental injury occurred while she was on her way to work and is not compensable under K.S.A. 2010 Supp. 44-508(f). Respondent asks, therefore, that the preliminary hearing Order be reversed.

Claimant contends the Board does not have jurisdiction over the issues in this appeal. In the alternative, claimant contends that because she met with personal injury by accident arising out of and in the course of her employment on January 20, 2011, she is entitled to benefits as provided by the Workers Compensation Act. Therefore, she asks that the ALJ's Order be sustained to the extent that it addresses medical care and the payment of certain medical bills incurred. To the extent the Order did not address the issue of payment of the cost of Dr. Edward Prostic's examination, claimant contends an order should be entered directing the respondent to pay that cost in its entirety.

The issue for the Board's review is:

(1) Did the ALJ exceed his authority and/or jurisdiction in granting claimant the medical benefits she requested by finding that the claimant suffered an accidental injury that arose out of and in the course of her employment with respondent?[2]

(2) Is claimant entitled to an order directing respondent to pay the cost of Dr. Prostic's examination in its entirety? Does the Board have jurisdiction over this issue?[3]

FINDINGS OF FACT

Claimant works for respondent as an Accounting Clerk II at the Wyandotte County Courthouse. Although claimant works for the District Court of Wyandotte County, she is paid by the State of Kansas. Claimant's job is to wait on people who come to the counter to pay fines, marriage license fees, or pay judgments, as well as to issue receipts for these transactions. These fees are associated with the District Court of Wyandotte County.

Claimant testified that she arrives for work anywhere from 15 to 20 minutes before 8 a.m. and parks in the parking structure connected to the Wyandotte County Courthouse. Claimant testified that Wyandotte County owns and operates the lot and dictates where everyone parks by assigning each employee in the building a parking spot. Employees are

[2] The ALJ made no specific findings of fact or conclusions of law concerning this issue but because he awarded benefits, the Board will assume the ALJ determined claimant's accident arose out of and in the course of her employment with respondent.

[3] The ALJ's Order is silent as to claimant's request that respondent pay the cost of Dr. Prostic's examination as a reasonable and necessary medical expense.

not allowed to park anywhere else in the lot. To get to her work area on the third floor of the building, claimant must take an elevator from the parking lot to the basement of the building, and then go through a breeze way to a door. She must use her key card to enter through the door and gain access into the building. Only employees of the courthouse can go in this way. Then claimant must make her way down a hallway and through the justice complex. She testified no one other than employees of the district court are allowed to use the hallway. She then would go past some double glass doors into a public area where security is located, then through another set of doors in the lobby to another elevator that takes her upstairs to where her work area is located. Claimant testified that she must go up three floors to get to her work area. She also testified that this is the only route available to get to her work area.

Claimant alleges that on January 20, 2011, as she was making the trek to her work area, she tripped and fell to the floor after her foot got caught on the edge of a floor mat near but before she passed through the double glass doors leading into the public area where the security desk is located. The area where she fell was an area used by other employees of the county courthouse, such as sheriff's deputies, jail employees, and other county employees.

As a result of the fall, claimant suffered injuries to her right knee, left shoulder and left forearm. Claimant testified her assistant supervisor and a fellow clerk from her office had been walking with her at the time of the accident. She testified that after the fall, she required medical care and was taken by ambulance to Providence Medical Center. There a wound on her knee was cleaned and bandaged, and she was released. Claimant was off work for 2 1/2 weeks following the accident.

The day after the accident, claimant received information on filing a workers compensation claim as well as a report of accident form to fill out. She was later informed that her claim for workers compensation was being denied. She then sought treatment for her knee with her family physician, Dr. Laurie Fisher. She has had no treatment for her shoulder. Claimant's current symptoms include skin damage to the right knee, aching in the right knee in cold temperatures, occasional use of a cane, and inability to raise the left shoulder high enough to wash her hair, do housework, run a vacuum sweeper, or change her bedding.

At the request of her attorney, claimant was sent to see Dr. Edward Prostic for an evaluation. She met with Dr. Prostic on March 28, 2011, and upon examination, he opined that claimant's January 20, 2011, trip and fall caused claimant to develop mild aggravation of patellofemoral arthritis of the right knee and a possible torn rotator cuff of the left shoulder. Dr. Prostic recommended claimant get an MRI of the shoulder and opined she will most likely require shoulder surgery. He also felt that the claimant should go for physical therapy for the shoulder to mobilize it prior to definitive treatment.

PRINCIPLES OF LAW

The Board's jurisdiction to review a preliminary hearing order is limited. K.S.A. 2010 Supp. 44-551(i)(2)(A) states in part:

> If an administrative law judge has entered a preliminary award under K.S.A. 44-534a and amendments thereto, a review by the board shall not be conducted under this section unless it is alleged that the administrative law judge exceeded the administrative law judge's jurisdiction in granting or denying the relief requested at the preliminary hearing.

K.S.A. 44-534a(a)(2) states in part:

> Upon a preliminary finding that the injury to the employee is compensable and in accordance with the facts presented at such preliminary hearing, the administrative law judge may make a preliminary award of medical compensation and temporary total disability compensation to be in effect pending the conclusion of a full hearing on the claim, except that if the employee's entitlement to medical compensation or temporary total disability compensation is disputed or there is a dispute as to the compensability of the claim, no preliminary award of benefits shall be entered without giving the employer the opportunity to present evidence, including testimony, on the disputed issues. A finding with regard to a disputed issue of whether the employee suffered an accidental injury, whether the injury arose out of and in the course of the employee's employment, whether notice is given or claim timely made, or whether certain defenses apply, shall be considered jurisdictional, and subject to review by the board. . . Except as provided in this section, no such preliminary findings or preliminary awards shall be appealable by any party to the proceedings, and the same shall not be binding in a full hearing on the claim, but shall be subject to a full presentation of the facts.

K.S.A. 2010 Supp. 44-501(a) states in part: "In proceedings under the workers compensation act, the burden of proof shall be on the claimant to establish the claimant's right to an award of compensation and to prove the various conditions on which the claimant's right depends." K.S.A. 2010 Supp. 44-508(g) defines burden of proof as follows: "'Burden of proof' means the burden of a party to persuade the trier of facts by a preponderance of the credible evidence that such party's position on an issue is more probably true than not true on the basis of the whole record."

An employer is liable to pay compensation to an employee where the employee incurs personal injury by accident arising out of and in the course of employment.[4]

[4] K.S.A. 2010 Supp. 44-501(a).

Whether an accident arises out of and in the course of the worker's employment depends upon the facts peculiar to the particular case.[5]

The two phrases arising "out of" and "in the course of" employment, as used in the Kansas Workers Compensation Act, have separate and distinct meanings; they are conjunctive and each condition must exist before compensation is allowable.

> The phrase "out of" employment points to the cause or origin of the accident and requires some causal connection between the accidental injury and the employment. An injury arises "out of" employment when there is apparent to the rational mind, upon consideration of all the circumstances, a causal connection between the conditions under which the work is required to be performed and the resulting injury. Thus, an injury arises "out of" employment if it arises out of the nature, conditions, obligations, and incidents of the employment. The phrase "in the course of" employment relates to the time, place, and circumstances under which the accident occurred and means the injury happened while the worker was at work in the employer's service.[6]

The "going and coming" rule contained in K.S.A. 2010 Supp. 44-508(f) provides in pertinent part:

> The words "arising out of and in the course of employment" as used in the workers compensation act shall not be construed to include injuries to the employee occurring while the employee is on the way to assume the duties of employment or after leaving such duties, the proximate cause of which injury is not the employer's negligence. An employee shall not be construed as being on the way to assume the duties of employment or having left such duties at a time when the worker is on the premises of the employer or on the only available route to or from work which is a route involving a special risk or hazard and which is a route not used by the public except in dealings with the employer. . . .

K.S.A. 2010 Supp. 44-508(f) is a codification of the "going and coming" rule developed by courts in construing workers compensation acts. This is a legislative declaration that there is no causal relationship between an accidental injury and a worker's employment while the worker is on the way to assume the worker's duties or after leaving those duties, which are not proximately caused by the employer's negligence.[7] In *Thompson*, the court, while analyzing what risks were causally related to a worker's employment, wrote:

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[5] *Kindel v. Ferco Rental, Inc.*, 258 Kan. 272, 278, 899 P.2d 1058 (1995).

[6] *Id.* at 278.

[7] *Chapman v. Victory Sand & Stone Co.*, 197 Kan. 377, Syl. ¶ 1, 416 P.2d 754 (1966).

> The rationale for the "going and coming" rule is that while on the way to or from work the employee is subjected only to the same risks or hazards as those to which the general public is subjected. Thus, those risks are not causally related to the employment.[8]

But K.S.A. 2010 Supp. 44-508(f) contains exceptions to the "going and coming" rule. First, the "going and coming" rule does not apply if the worker is injured on the employer's premises.[9] Another exception is when the worker is injured while using the only route available to or from work involving a special risk or hazard and the route is not used by the public, except dealing with the employer.[10]

By statute, preliminary hearing findings and conclusions are neither final nor binding as they may be modified upon a full hearing of the claim.[11] Moreover, this review of a preliminary hearing order has been determined by only one Board Member, as permitted by K.S.A. 2010 Supp. 44-551(i)(2)(A), as opposed to being determined by the entire Board as it is when the appeal is from a final order.[12]

ANALYSIS

The Board has jurisdiction to consider the issue raised by respondent because it involves a dispute as to whether claimant's accident arose out of and in the course of her employment with respondent. In an appeal from a preliminary hearing order, the Board is without jurisdiction to consider the issue raised by claimant concerning the payment of a particular medical bill.

At the time of her accident, claimant was not working; she had not assumed the duties of her employment. Rather, she was on her way to assume the duties of her employment. The proximate cause of her injury was not due to the respondent's negligence. As such, the "going and coming" rule applies and will preclude compensation unless claimant was on respondent's premises or on the only available route to or from work which involved a special risk or hazard and which is a route not used by the public except in dealings with the respondent.

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[8] *Thompson* v. *Law Offices of Alan Joseph*, 256 Kan. 36, 46, 883 P.2d 768 (1994).

[9] *Id*. at Syl. ¶ 1. Where the court held that the term "premises" is narrowly construed to be an area controlled by the employer.

[10] *Id*. at 40.

[11] K.S.A. 44-534a; see *Quandt v. IBP*, 38 Kan. App. 2d 874, 173 P.3d 1149, *rev. denied* 286 Kan. __, (2008); *Butera v. Fluor Daniel Constr. Corp.*, 28 Kan. App. 2d 542, 18 P.3d 278, *rev. denied* 271 Kan. 1035 (2001).

[12] K.S.A. 2010 Supp. 44-555c(k).

Claimant was not on the premises of the respondent when her accident occurred. Claimant worked for the State of Kansas. The courthouse is owned, operated and controlled by Wyandotte County. The hallway where claimant fell was not part of the office of the Clerk of the District Court, and it was not used exclusively by employees of the office of the Clerk of the District Court and/or persons having business with the office of the Clerk of the District Court. It is also used by certain Wyandotte County employees. It is conceivable that the hallway was essentially or primarily used only by employees of respondent and, therefore, ostensibly part of and the effective equivalent of respondent's premises, as in *Rinke*,[13] but that evidence is not in the record as it currently exists. In addition, the fact that the County directed claimant where to park does not evidence control by respondent over either the parking lot or the hallway area of the Judicial Center Complex where claimant fell or further claimant's contention that those areas be treated as the employer's (respondent's) premises. As such, claimant has failed to prove her accident falls within an exception to the going and coming rule.

CONCLUSION

Claimant has failed to prove her accident arose out of and in the course of her employment with respondent.

ORDER

WHEREFORE, it is the finding, decision and order of this Board Member that the Order of Administrative Law Judge Steven J. Howard dated July 14, 2011, is reversed.

IT IS SO ORDERED.

Dated this _____ day of September 2011.

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HONORABLE DUNCAN A. WHITTIER
BOARD MEMBER

c: James E. Martin, Attorney for Claimant
Karl L. Wenger, Attorney for Respondent and its Insurance Carrier
Steven J. Howard, Administrative Law Judge

[13] *Rinke v. Bank of America*, 282 Kan. 746, 148 P.3d 553 (2006).